80-1987

NO.

Office-Supreme Court, U.S.
FILED
MAY 22 1981

In the Supreme Court of the United States

OCTOBER TERM,

RED DIAMOND SUPPLY, INC.
Petitioner

VERSUS

LIQUID CARBONIC CORPORATION (Settled)
AND ACME WELDING AND SUPPLY, INC. AND
AWISCO CORPORATION
Respondents

TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the Court of Appeals violated its own en banc rule of when an N.O.V. should be granted or the granting of same by a District Court should be reversed.

2. Whether the Court of Appeals rule of granting an N.O.V. as stated by the en banc Court in *Boeing Company vs. Shipman*, (5th Cir. 1969) 411 F. 2d 365 is contra to the prior rulings of this Court.

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Red Diamond Supply Company, Inc. (Red Diamond), petitioner prays that a Writ of Certiorari issue to review that part of the judgment of the United States Court of Appeal for the Fifth Circuit, entered February 23, 1981 affirming for other reasons the judgment of the United States District Court for the Eastern District of Louisiana, granting to Respondents an N.O.V. entered on or about July 5, 1978.

I

OPINION OF THE COURTS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit to which this petition is addressed is reported at 637 F. 2d 1001 and also appears at page A-1 of the appendices to this petition. The transcription of the oral opinion of the District Court has not been reported but appears at appendices page A-8.

II

JURISDICTIONAL STATEMENT

On February 23, 1981 the Court of Appeal entered its judgment in favor of Respondents and against your petitioner affirming the decision of the District Court of giving these Re - spondents an N.O.V. but this affirming was done for reasons other than those announced by the District Court. This Court has jurisdiction to hear the petition under 28 U.S.C.A. 1254 (1) and the petition has been filed within the time required by 28 U.S.C.A. 2101 (c). Liquid Carbonic Corporation a co-defendant in the District Court, settled with Petition prior to the trial of this case and therefore is not a respondent. Unibraze Corporation was dismissed and this was not appealed to the Circuit Court.

III
LAW PROVISIONS INVOLVED

Your Petitioner raises the question as to the correct interpretation of the Seventh Amendment of the Constitution of the United States, where it states: In suits at common law, where the value in controversy shall exceed twenty-five dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law.

IV
STATEMENT OF THE CASE

Your petitioner brought this suit in the United States District Court for the Eastern District of Louisiana on May 31, 1974 alleging violation of the Sherman Act, 15 U.S.C.A. 1 et seq. and the Louisiana Little Sherman Act, LSA-RS 51:122 et seq. in that the Liquid Carbonic Corporation (Liquid) had conspired with other manufacturers of industrial gases to restrict competition among these manufacturers and that pursuant to this restriction Liquid conspired with its distributors as to territory and customers and thereby price. Acme/Awisco and Red Diamond were among those distributors that participated with Liquid in this conspiracy but when Red Diamond stopped conspiring it was terminated by Liquid.

Since Acme/Awisco and Red Diamond are all in the metropolitian New Orleans, Louisiana market area the facts by necessity centered around New Orleans. Red Diamond is not located in the City of New Orleans but is about 20 miles up the Mississippi River in Luling, Louisiana which is generally considered metropolitian New Orleans.

Liquid has a terminal in New Orleans where its products are stored and then shipped to Acme/Awisco and Red Diamond. Respondents maintained that Liquid purchased all of its supplies from other manufacturers and then sold these supplies to its distributors and to its own accounts that purchased direct from Liquid that were of the same type its distributors sold to. All accounts including distributors were under contract and the contract provided that another source of supply could be sought after if there was a price increase.

Your Petitioner subpoenaed the records of Liquid held by Robert L. Williams (Williams) and took his initial deposition on August 22, 1974. On December 19, 1977 your Petitioner took the deposition of Williams again and documented by this deposition that his immediate superior at Liquid had instructed him to destroy his records except a few and instructed him that his first depositional statement should agree with their own stories. Prior to this second deposition of Williams your Petitioner had obtained extensive discovery from Liquid and Acme/Awisco and the facts obtained from Williams at this second deposition would have been very valuable to that prior discovery.

At the trial, Williams admitted that he had not told the truth at his first deposition and that he had destroyed documents all at the instruction of his superiors.

This case went to trial before a Jury. Liquid settled the Saturday before the trial. Acme/Awisco moved at the Conclusion of the trial for a directed verdict which was denied and then the case was sent to the Jury who found for your Petitioner. The trial court then granted N.O.V. finding that "Plaintiff's case is built upon a mere scintilla of evidence indicating possible wrongdoing by Liquid Carbonic but not by Acme, and there simply was no conflict and substantial evidence sufficient to create a jury question". In the alternative the trial court granted a new trial to the Respondent if the N.O.V. was reversed.

In a lengthy opinion the Circuit Court affirmed the District Court's decision on grounds different from those upon which the District Court relied.

Your Petitioner respectfully suggest that the appellate Court is in error when it stated:

> Red Diamond did allege a conspiracy between all manufacturers and suppliers of gas product not to compete among themselves – which would indicate a lack of competition – but the evidence it produced was not sufficient to establish such a conspiracy[7], And the jury most probably rejected it as well[8].

Red Diamond, supra at 1006

Your Petitioner maintains that the Jury found a manufacturers conspiracy and/or that it is error under *Boeing*, supra for the Court to have an inference contrary to the verdict of the Jury that favors mover all as will be more fully explained in the argument. That due to the fact that the Jury found a shared monopoly or manufacturers conspiracy that the rest of the appellate Court's opinion is in error since Acme/Awisco may be chargable as a co-conspirator and that the per se rule applies in such a case.

V.

REASONS FOR GRANTING THE WRIT

Under the opinion of the en banc appellate Court as stated in *Boeing Co. vs. Shipman*, supra that Court held that the opinions of this Court on the jury issue in FELA actions was not the same in non FELA cases. *Boeing*, supra 373.

In *Boeing*, supra that Court held that a trial court should consider all of the evidence – not just the evidence which supports the non-mover. From this point it instructed the trial Court to give all reasonable inferences most favorable to the party opposing the motion, *Red Diamond*, your Petitioner.

Yet with this instruction that Court in footnote 8 provided the inference that the jury rejected the allegation of a manufacturers conspiracy basing this inference on the fact that the

credibility of Williams the former sales representative of Liquid was not very good at all even though that Court maintained that credibility was a function for the Jury. See *Boeing*, supra at 375 and footnote 16.

Now let us look at some of the evidence Williams testified to. But before we do this, one should realize that the Circuit Court in footnote 7 is in error on two statements. In the first one the Court stated:

> Williams also testifed, however, that Liquid would sell to a customer that was willing to cancel its contract with the competition.

What Williams testified to in part was the following:

> (Q) Did Liquid Carbonic Corporation seek the bulk customers, bulk liquid oxygen customers, of other manufacturers?
>
> (A) Liquid Carbonic Corporation would not entertain any thought of bidding into anybody's existing contract, whether it be for bulk or cylinders or any product.
>
> . . .
>
> (Q) Did you follow that policy yourself?
>
> (A) I tested it once or twice and then started adhering to it, yes sir.
>
> (Q) What—explain how you tested it?

(A) Well, sir, I went by one large customer in the area, namely that of Southern Scrap, and he's a very large scrap dealer that uses a goodly amount of products on a monthly basis in excess of 1,000,000 cubic feet. In which commodity, I don't remember, and while talking to the purchasing agent, I asked him if he would be responsive to me bidding on his requirements for the following year, and at that time

. . .

(A) All right

I attempted that one time specifically and I believe there was one other to bid on an existing business under contract to someone else and the company refused the bid.

(Q) To what account did the company refuse the bid?

(A) Southern Scrap specifically.

(Q) Were you given a sale policy with regard to whether you could bid on the customers of other manufacturers? And if so what policy were you instructed to follow?

(A) I was instructed that I was not to solicit anyone's business that was under an existing contract to any of our competitors.

(Q) Who instructed you to this effect?

(A) Everyone form Corporate counsel clear

down to the regional manager.

(Q) Who was the regional manager?

(A) Mr. Wittie, W. C. Wittie.

Trial Transcript, May 7, 1978
Page 121-123, William Testifying.

According to Mr. Williams, there was no competition among manufacturers like Liquid, Air Products, N C G, Lindie and Big Three for bulk account customers and Cylinder customers or of each others distributors. Transcript May 7, 1978, page 134-135. Pertuit, president of Red Diamond confirmed this. See Trial Transcript May 6, 1978, page 32-34. Mr. Korman a former employee of Liquid and later the Vice President of Acme/Awisco testified that he did not know whether other manufacturers were selling gases in competition with Liquid. See Trial Transcript, May 8, 1978, page 215. Then too in a letter Wittie, the regional manager of Liquid declared that he was sure Lindie would not violate this agreement. See Plaintiff document P-24. One must note that Red Diamond's agreement with Liquid had a clause in it that if Liquid raised the price your Petitioner could go and get prices from others but this was of little value since none of the others would bid into an account under contract. In contradiction of this evidence that the manufacturers had an agreement not to compete Acme/Awisco offered their loss of the American Marine account to Air Reduction. See transcript, May 12, 1978, Belle, President of Respondents page 76-80 and the fact that Pertuit of Red Diamond

testified he had to buck the competition and compete with other distributors. See Pertuit, May 6 & 7, 1978, Transcript 6/190, 192, 219 & 7/58. Your Petitioner suggest that all of this testimony of Pertuit offered by Respondents is taken out of the context in which it was given and was relevant to the fact after Pertuit/Red Diamond broke away from the conspiracy which fact the Jury understood.

To say the least their was a substantial factual dispute on whether there was a manufacturer's conspiracy not to compete and substantial evidence to support such an allegation. This evidence the Jury considered and ruled on in favor of your Petitioner issuing its Judgment in favor of your Petitioner.

The other evidence offered by your Petitioner that their was a wide divergency in prices Liquid charged its distributors throughout the country for cylinder gas was offered to collaborate the fact of this manufacturer's conspiracy evidenced by the before mentioned evidence and it did not show that this difference was due to volumn. One example was three months of sales by Liquid in Detroit Michigan:

AREA DISTRICT	PRICE	VOLUMN	PLAINTIFF DOCUMENT
1) P. K. Supply	.58/CWT	37,000	71U
2) Smith Welding	.58/CWT	1,000,000	71V
3) Wayne	.83/CWT	23,000,000	71Q
4) A & G	.84/CWT	222,000	71P
5) Arrow	.95/CWT	501,000	71L

If volumn was the reason for a lower price how come P. K. paid so little and Arrow paid such a high price? This one example evidences the fact of no competition for if the manufacturers did compete Arrow would not be paying almost twice what P. K. was paying for the same product, Oxygen. One document is not going to prove interstate commerce whereas one document is strong evidence to collaborate the truthfulness of other evidence. Since almost all of the other evidence concerned activities in the New Orleans Metropolitan area a conservative Jury could well have decided against interstate commerce and this would have been the "reasonable inference" most favorable to the party opposed to the motion.

Therefore not considering the credibility of Williams, reasonable and fair minded men in the exercise of an impartial judgment, looking at the substantial evidence offered by Williams, Pertuit, Korman, Wittie and the sales record of Liquid *might* reach a different conclusion and therefore the motion of Respondent for N.O.V. should have been denied and/or reversed by the Circuit Court.

But this Appellate Court did not use these standards and this Court should take this Writ of Certiorari and itself look at this evidence and then reverse this appellate court.

In the alternative petitioner respectfully suggest that

Boeing, supra is an incorrect statement of the law and is in conflict with this Court's decision in *Wilkerson vs. McCarthy*, (1949) 69 S. Ct. 413, 336 U.S. 53, 93 L.Ed. 497, 9 Wright & Miller Federal Practice & Procedure, 2529 p. 571.

The correct rule on the portion of evidence that the Court should consider on a motion to N.O.V. should be all of the evidence favorable to the position of the party opposed to the motion N.O.V. as well as any unfavorable evidence offered by the mover, Acme/Awisco that the Jury is required to believe. See 9 Wright & Miller, supra citing Cooper, Direction for Directed Verdicts: A compass for Federal Courts, 1971, 55 minn. L. R. 903, 948-953 and other cases cited at Footnote 51 together with what evidence a Jury is required to believe reviewed in § 2527.

In allowing the trial Court to review all the evidence of all parties this court is basically doing away with the Jury system or adding a couple of extra Jury members to the panel, i.e., the Judges.

VI

CONCLUSION

Therefore your Petitioner respectfully suggest that this Court should grant Certiorari in this case in order that all Courts and trial practioners will have the benefit of this

court's analysis of this extremely important issue relative to when a trial or appellant Court can take the fact issue from the jury.

After making that determination this Court should reverse the appellate Court and re-instate the Jury's verdict in this matter thereby showing that the Jury System is still alive and well in these United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner, has caused service to be made upon Peter Frank Liberto, 416 Gravier Street, New Orleans, Louisiana 70130 Counsel of Record for Respondents of two copies of this petition this_____day of_____, 1981.

_____

PATRICK D. BREEDEN

Appendix A

RED DIAMOND SUPPLY, INC.,
Plaintiff-Appellant,
v.
LIQUID CARBONIC CORPORATION et al., Defendants-Appellees.

No. 78-2751.
United States Court of Appeals,
Fifth Circuit.
Unit A

Feb. 23, 1981.

Distributor brought action against manufacturer and another distributor alleging among other things violation of the Louisiana antitrust laws and the Louisiana Unfair Trade Practices and Consumer Protection Law. The United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., entered judgment n.o.v. against the distributor on the state antitrust claim and directed a verdict against the distributor on the unfair trade practices claim and the distributor appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) it was not demonstrated that manufacturer's agreement with distributors to maintain territorial and customer restrictions on sales of

its products, while presumably reducing intrabrand competition, adversely affected interbrand competition so as to violate state antitrust laws and, therefore, termination of distributor for violation of such agreement did not constitute an antitrust offense, and (2) the agreement with distributors did not contravene the Louisiana Unfair Trade Practices and Consumer Protection Law, where no injury to competition was proved.

Affirmed.

1. Monopolies 17(2.1)

It was not demonstrated that manufacturer's agreement with distributors to maintain territorial and customer restrictions on sales of its products, while presumably reducing intrabrand competition, adversely affected interbrand competition so as to violate state antitrust laws, and, therefore, termination of distributor for violation of such agreement did not constitute an antitrust offense. LSA-R.S. 51:122.

2. Monopolies 14

When the manufacturer is the source of restraints, the conspiracy is vertical. LSA-R.S. 51:122.

3. Monopolies 14

Where allegation was that manufacturer imposed agreement upon its distributors to abide by territorial and customer restrictions, such agreement was a vertical one, and the restrictions imposed were vertical restrictions, and the fact that manufacturer also distributed some of its own goods did not alter the situation. LSA–R.S. 51:122.

4. Monopolies 12(1.10)

Where the alleged restrictions are vertical, and not directed at fixing prices, their legality is governed by the rule of reason and in order to prevail under the rule of reason, a plaintiff must show that the defendants' conduct has an adverse effect on competition. LSA–R.S. 55:122.

5. Trade Regualtion 871

Manufacturer's agreement with distributors to maintain territorial and customer restrictions did not contravene Louisiana Unfair Trade Practices and Consumer Protection Law, where no injury to competition was proved. LSA–R.S. 51:1405.

Russell & Derussy, Patrick D. Breeden, Henican, James & Cleveland, C. Ellis Henican Jr., New Orleans, La., for plaintiff-appellant.

Peter Frank Liberto, New Orleans, La., for defendants-appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, AINSWORTH and GEE, Circuit Judges.

GEE, Circuit Judge:

Liquid Carbonic Corporation ("Liquid"), a manufacturer of industrial gas products, supplied such products to three distributors in the New Orleans area, including plaintiff Red Diamond Supply ("Red Diamond") and defendant Acme Welding and Supply Company ("Acme"), which was acquired by defendant Awisco Corporation. Liquid also sold some of its products directly to customers who used them. Red Diamond alleged that a conspiracy existed between Liquid and its three distributors, including Red Diamond itself, to maintain territorial and customer restrictions on sales of Liquid's products; that Liquid, in concert with Acme, terminated Red Diamond for transgressing these restrictions; and that Liquid and Acme thus violated, inter alia, sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, the corresponding provisions of the Louisiana antitrust laws, La.Rev.Stat.Ann. §§ 51:122, :123, and a prohibition of the Louisiana Unfair Trade Practices and Consumer Protection Law, La.Rev.Stat.Ann. § 51:1405.[1] Red Diamond also alleged that Liquid participated in a national conspiracy with other manufacturers of industrial gases to restrict competition among themselves and that, pursuant to this conspiracy, Liquid prevented its distributors from competing for the customers of other manufacturers and their distributors.

---

1. Red Diamond also urged violations of other statutes, but these claims were disposed of early in the proceedings below on a grant of summary judgment from which Red Diamond does not appeal.

Red Diamond settled its claims against Liquid shortly before commencement of a jury trial in the district court but proceeded to press the same claims against Acme and Aswico. Prior to submitting the case to the jury, the court granted the defendants directed verdicts on Red Diamond's Sherman Act section 2 and corresponding state antitrust claims, which are not appealed, and on its Louisiana unfair trade practices claim. The jury returned a verdict for defendants on Red Diamond's Sherman Act section 1 claim, which also is not appealed, but found for Red Diamond on its claim under the Louisiana counterpart of section 1. The court, however, granted judgment n.o.v. to defendants on the state antitrust claim because it found the evidence of a conspiracy involving Acme insufficient to sustain the verdict. Red Diamond appeals the judgment n.o.v., as well as the court's directed verdict on its state unfair trade practices claim.[2] We affirm both of the court's decisions, although on grounds different from those upon which the court relied.

I. The Louisiana Antitrust Claim.

The sole antitrust claim before us is one arising under

2. The court also granted defendants a new trial conditioned on a reversal by this court of the judgment n.o.v. , and Red Diamond also appeals this decision. But since we do not reverse the judgment n.o.v., we need not consider the propriety of the grant of a new trial.

Louisiana law, La.Rev.Stat.Ann. § 51:122, that state's counterpart to section 1 of the Sherman Act.[3] There is very little case law construing or applying the Louisiana antitrust statutes and none that is particularly helpful to us in this case. The state antitrust statutes, however, were fashioned after the federal antitrust statutes, *Diliberto v. Continental Oil Co.*, 215 F.Supp. 863, 864 (E.D.La.1963), and the court below ruled that, except for the federal interstate commerce requirement, the same principles of law apply under both. Since we typically accord deference to a district court's decision regarding the law of the state in which it sits, *Hensley v. E.R. Carpenter Co.*, 633 F.2d 1106, 1111 (5th Cir. 1980); *Watson v. Callon Petroleum Co.*, 632 F.2d 646, 648 (5th Cir. 1980), since we find authority consistent with the court's decision in this instance, *Louisiana Petroleum Retail Dealers v. The Texas Co.*, 148 F.Supp. 334, 337 (W.D.La.1956), and none to the contrary, and since all of the parties before us accept that decision, we will proceed under

---

3. Section 51:122 provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in this state is illegal.

Whoever violates this Section shall be fined not more than five thousand dollars, or imprisoned, with or without hard labor, not more than three years, or both.

Section 51:137 confers a civil action for treble damages on parties injured by violations of section 51:122.

the guidance of federal law, and in particular the law of this circuit. In doing so, however, we emphasize that we are but vicariously applying what we presume to be the law of Louisiana.

[1] The district court granted defendants' motion for a judgment n.o.v. because it found the evidence insufficient to establish a conspiracy to impose territorial and customer restrictions on Liquid's distributors and to terminate Red Diamond for violating those restrictions. We find it unnecessary, however, to examine the sufficiency of the evidence thereon because we conclude that even if Liquid did require its distributors to agree to abide by territorial and customer restrictions, Red Diamond has not shown that such an agreement, and hence its alleged termination pursuant thereto, would contravene antitrust laws.

[2, 3] The first step of our analysis is to determine whether the alleged conspiracy was horizontal or vertical. If horizontal, it would be illegal per se, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 n.28, 97 S.Ct. 2549, 2561 n.28, 53 L.Ed.2d 568 (1977); if vertical, it would be tested by the rule of reason, *id.* at 58-59, 97 S.Ct. at 2561–62. The district court instructed the jury that the alleged conspiracy was a horizontal one because Liquid sold some of its products directly to customers in competition with its distributors. We disagree.

> Conspiracies between a manufacturer and its distributors are only treated as horizontal . . . when the source of the conspiracy is a combination of the distributors. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 372-73, 87 S.Ct. 1856, [1862, 63] 18 L.Ed.2d 1249 (1967); *cf. Posner, the Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U.Chi. L. Rev. 1, 17 (1977) (condemning distributor cartels).

H & B Equipment Co. v. International Harvester Co., 577 F.2d 239, 245 (5th Cir. 1978). When the manufacturer is the source, the conspiracy is vertical.[4] *Arnold, Schwinn & Co.* 388 U.S. at 372, 87 S. Ct. at 1862; *in re Nissan Antitrust Litigation*, 577 F.2d 910, 915 (5th Cir. 1978), *cert denied*, 439 U.S. 1072, 99 S.Ct. 843, 59 L.Ed.2d 38 (1979); *H&B Equipment Co.*, 577 F.2d at 245-46. Since the allegation here is that Liquid imposed an agreement upon its distributors to abide by territorial and customer restrictions, that agreement is a vertical one, and the restrictions imposed are vertical restrictions.

That Liquid also distributed some of its own goods does not alter the situation. *See Arnold, Schwinn & Co.*, 388 U.S.

4. The reason for focusing on the source of restraints on distributors is ecnomic. Distributors have an incentive to agree among themselves to restrict, competition, such as by al-

Note 4 - Continued

locating territories, in order to raise the price they receive for their product because to do so normally increases their profits. Such a horizontal conspiracy, which generates simply an increase in prices, is generally detrimental to consumers and is illegal per se.

Not only does a horizontal conspiracy among distributors hurt consumers, however; it injures the manufacturer as well because the higher retail price of the product reduces the quantity sold at retail and hence the quantity demanded from the manufacturer. A manufacturer generally prefers that its distributors sell its product for as low a price as possible, given the price at which it sells the product to them, i.e., for as small a markup as possible over the wholesale price, because its sales of the products are normally greater the lower the retail price. *See Continental T.V.*, 433 U.S. at 56 & n.24, 97 S.Ct. at 2560 & n.24. A manufacturer thus will typically encourage intrabrand competition in order to enhance interbrand competition, i.e., the competitiveness of its product with those of other manufacturers. Sometimes, however, a manufacturer will find it advantageous to impose restrictions, such as assigned territories, on its distributors in order to induce them to undertake advertising or promotional activities, to render more or better services to customers, or simply to push the product more vigorously. By facilitating such efforts on the part of distributors, the restrictions tend to increase retail sales of the product, and may do so on balance even if they also generate some increase in the price the distributors charge. Thus, restrictions on intrabrand competition are sometimes a means whereby a manufacturer can increase interbrand competition. Because increasing interbrand competition is generally socially desirable and because intrabrand restrictions are generally not socially harmful when there is significant interbrand competition, manufacturer-imposed, i.e., vertical, restraints are governed by the rule of reason. *See id.* at 54-55, 97 S.Ct. at 2559-2560; *but see id.* at 51 n.18, 97 S.Ct. at 2558 n.18 (vertical price restrictions are per se illegal).

at 369-72, 87 S.Ct at 1860-1862 (territorial and customer restrictions imposed by a manufacturer on its wholesale distributors are vertical even though the manufacturer also distributed directly to retailers); *H&B Equipment Co.*, 577 F.2d at 245-46 (conspiracy between a manufacturer and one of its dealers to terminate another dealer is a vertical conspiracy even though the manufacturer also sells direct); *In the Matter of the Coca-Cola Co.*, 91 F.T.C. 517, 610-15 (1978) (territorial restrictions imposed by a soft drink manufacturer on independent bottlers are vertical even though the manufacturer also has bottling subsidiaries). *But cf. Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894 (5th Cir.) (territorial restrictions imposed on a distributor by a manufacturer that also distributes its products itself are horizontal where the distributor also manufactures products that compete with those of the manufacturer), *cert. denied*, 412 U.S. 923, 93 S.Ct. 2736, 37 L.Ed.2d 150 (1973). When a producer elects to market its goods through distributors, the latter are not, in an economic sense, competitors of the producer even though the producer also markets some of its goods itself; rather, the distributors are "agents" of the producer, employed because the producer has determined that it can supply its goods to consumers more efficiently by using distributors than it can by marketing them entirely by itself. *See Continental T.V.*, 433 U.S. at 56 & n.24, 97 S.Ct. at 2560 & n.24; note 4, *supra*. While it is possible that a nominally vertical arrangement may in fact be a horizontal one in disguise, *e.g.*, *United States v. Topco Associates, Inc.*,

405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972) (territo - rial restrictions imposed by a buying association on its members are horizontal where the members collectively own the association); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967) (territorial restrictions imposed by a manufacturer on its licensees are horizontal where the licensees own the manufacturer); *see Continental T.V.*, 433 U.S. at 57 n.28, 97 S.Ct. at 2561 n.28, such is not the case here.[5]

[4] Since the alleged restrictions are vertical (and not directed at fixing prices[6]), their legality is governed by the rule of reason. *Continental T.V., supra; H&B Equipment Co.*, 577 F.2d at 246. In order to prevail under the rule of reason, a plaintiff must show that the defendants' conduct has an adverse effect on competition. *Daniels v. All Steel Equipment, Inc.*, 590 F.2d 111, 113 (5th Cir. 1979); *H&B Equipment, Co.*, 577 F. 2d at 246; *Northwest Power Products, Inc. v. Omark Industries, Inc.*, 576 F.2d 83, 90 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116, 99 S.Ct. 1021, 59 L.Ed.2d 75 (1979); *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 380 (5th Cir. 1977). This Red Diamond failed—and did not even seriously attempt—to do. While the restrictions it alleged

5. Given the divergent interests between a manufacturer and its distributors, *see* note 4, *supra*, it is unlikely that a manufacturer not controlled by its distributors, such as Liquid, would be a party to a distributor-created, and hence distributor-serving, conspiracy.

6. Vertical price restrictions are per se illegal. *Continental T.V.*, 413 U.S. at 51 n.18, 97 S.Ct. at 2558 n.18.

presumably would reduce intrabrand competition, *i.e.*, competition among Liquid's distributors, to some extent, this presumptive effect by itself is not sufficient to establish injury to competition for several reasons.

> First,
>
> [t]he Supreme Court in *Continental T.V.* recognized that a reduction in intrabrand competition is not pernicious as long as there exists interbrand competition, which acts as a "significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." 433 U.S. at 53 n.19, 97 S.Ct. at 2559.

Daniels v. All Steel Equipment, Inc., 590 F.2d at 113. The record strongly suggests that there was significant interbrand competition in industrial gas products in the New Orleans area. It reveals, for example, that there were a total of seven manufacturers or suppliers of these products and a considerable number of their distributors serving the area. The products themselves, moreover, were highly undifferentiated so that different brands were readily substitutable for each other in actual use. These facts are strongly indicative of a competitive market, and there is little in the record suggesting the contrary. Red Diamond, for example, did not produce market share data to support an inference that the market, despite the number of firms, was in fact concentrated. It did not even introduce Liquid's market

share to suggest that Liquid's intrabrand restrictions might have had an effect on interbrand competition in the market. Indeed, as the district court found, Red Diamond failed to prove just what the relevant market was. The record indicates, moreover, that Liquid was not in fact the largest producer of industrial gas products in the New Orleans area. Red Diamond did allege a conspiracy between all the manufacturers and suppliers of gas products not to compete among themselves—which would indicate a lack of competition—but the evidence it produced was not sufficient to establish such a conspiracy,[7] and the jury most

7. The principal evidence upon which Red Diamond relied was the testimony of a former Liquid salesman, Robert L. Williams III. That testimony, together with a letter to which Red Diamond refers, establishes at most that Liquid did not seek business from customers or distributors *under contract* to a competitor. Williams also testified, however, that Liquid would sell to a customer that was willing to cancel its contract with the competitor. Thus, the proffered evidence may well demonstrate only that Liquid preferred exclusive dealing arrangements or that it was wary of inducing breaches of contract. While Williams' testimony is probably consistent with the existence of a conspiracy among manufacturers, it is not sufficient to establish such a conspiracy. At the very least, there would have to be some showing of an agreement between Liquid and other manufacturers, which there is not.

Red Diamond also relied on documents showing a wide divergence in the prices Liquid charged its distributors throughout the country for cylinder oxygen. While Red Diamond offered these data to prove a lack of competition among manufacturers, the documents on their face show that the price differentials are explainable simply in terms of differences in the cumulative volume of cylinder oxygen sold. The other bits of evidence Red Diamond offered are similarly unprobative of a conspiracy among manufacturers.

probably rejected it as well.[8] Thus, we find no basis for inferring a lack of interbrand competition or that the alleged restrictions adversely affected interbrand competition.

Not only does the record not demonstrate that the alleged restrictions harmed interbrand competition; it suggests that they may have improved it. Because each manufacturer's products are virtually indistinguishable structurally, service is an important basis upon which the firms can compete, and Liquid could well have decided that confining each of its distributors to a particular area or type of customer would enable them more effectively to service their customers and thus would increase

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8. The trial judge instructed the jury that the state and federal antitrust offenses alleged both had the same elements except that the latter also carried an interstate commerce requirement, and the jury found a state but not a federal violation. Thus, the jury apparently found the interstate commerce requirement not to have been met. It is clear, however, that the intermanufacturer conspiracy Red Diamond alleged extended well beyond the borders of Louisiana. It would appear, therefore, that the jury rejected the allegation of such a conspiracy. That it should do so, moreover, is not surprising since the principal evidence offered was the testimony of former Liquid salesman John Williams, *see* note 7, *supra*, who not only was a friend of the president of Red Diamond but also testified that a deposition he had previously given in the case was perjured.

It is possible, however, that the jury concluded that a conspiracy among manufacturers did exist but that defendant Acme, which was merely one of Liquid's distributors, was not involved in the conspiracy. But since the alleged agreements between Liquid and its distributors were supposedly an integral part of the intermanufacturer conspiracy, Acme may well have been chargeable as a coconspirator in the broader scheme as a matter of law.

the demand for Liquid's goods. Both the Supreme Court and this court have recognized that vertical restrictions on intrabrand competition well may increase interbrand competition. *See Contintental T.V.*, 433 U.S. at 54-55, 97 S.Ct. at 2559-60; *Del Rio Distributing, Inc. v. Adolph Coors, Co.*, 589 F.2d 176, 179 (5th Cir.), *cert. denied*, 444 U.S. 840, 100 S.Ct. 80, 62 L. Ed.2d 52 (1979); note 4, *supra*.

The final reason why we find the presumed reduction in intrabrand competition insufficient to constitute injury to competition is that, given the apparent nature of the market and Liquid's relative place in it, Liquid most probably could have chosen, consistent with the antitrust laws, to do all of its own distributing in the New Orleans area, either by cancelling its distributors and expanding internally or by simply acquiring the distributors themselves.[9] If Liquid has thus vertically integrated into distributing, it clearly could have instructed its employees to abide by territorial and customer restrictions. And since Liquid could have accomplished these ends by either internal expansion or merger, either of which would have had an even greater impact on intrabrand competition, we fail to see why it would have been unreasonable for Liquid to accomplish the same ends by contract. *See Northwest Power Products, Inc. v. Omark Industries, Inc.*, 576 F.2d 83, 89 (5th Cir. 1978) ("If a defendant could achieve a desired result either by lawful merger or by engaging in unfair competition, the choice of the unfair competition route alone should not give rise to an antitrust violation."), *cert. denied*, 439 U.S. 1116, 99 S.Ct. 1021, 59 L.Ed.2d 75

9. At least one manufacturer in the New Orleans area in fact did all of its own distributing in that area.

(1979); *Associated Radio Service Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1351 (5th Cir. 1980) (the defendant in *Northwest Power Products* "probably could have eliminated all distributors of its products by vertical integration (i.e., by beginning distribution of its own products) without running afoul of the antitrust laws"). To hold otherwise would in general simply create "an incentive for vertical integration into the distribution system, thereby eliminating to that extent the role of independent businessmen." *Contintental T.V.*, 433 U.S. at 57 n.26, 97 S. Ct. at 2561 n.26.

In sum, Red Diamond under the rule of reason had the burden of proving anticompetitive effect, *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d at 380, and this it failed to do. Since it did not establish that the restrictions Liquid allegedly imposed upon it contravened the antitrust laws, it perforce did not show that its alleged termination for violating those restrictions constituted an antitrust offense.[10] Thus, we affirm the judgment n.o.v. entered by the district court.

II. The Louisiana Unfair Trade Practices Claim.

[5.] Red Diamond also appeals the district court's directed verdict on its claim under the Louisiana Unfair Trade Practices

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10. Also, Red Diamond produced no evidence that its termination per se had an anticompetitive effect. *See Daniels v. All Steel Equipment, Inc., supra; H&B Equipment Co., supra.*

and Consumer Protection Law, which in part proscribes "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." La.Rev. Stat.Ann. § 51:1405(A). Under section 51:1409(A), "[a]ny person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by R.S. 51:1405, may bring an action individually but not in a representative capacity to recover actual damages." The district court issued its directed verdict because it decided that lost profits, the type of damages Red Diamond alleged; were not "actual damages" under section 51:1409(A). While we have serious reservations about this decision,[11] we need not conclusively resolve them because we find

11. According to the Louisiana Supreme Court, "actual damages" as used in section 51:1409 means simply "[monetary] relief other than the refund of the purchase price and the return of the status quo that constitutes restitution." *Louisiana ex rel. Guste v. General Motors Corp.*, 370 So.2d 477, 486 (La.1979). Generally, the Louisiana courts allow recovery of lost profits as a component of damages in such contexts as breach of contract, *George W. Garig Transfer, Inc. v. Harris*, 226 La. 117, 130, 75 So.2d 28, 33 (1954); *Al Smith's Plumbing & Heating Service, Inc. v. River Crest, Inc.*, 365 So.2d 1122, 1126 (La.Ct.App.1978), torts, *Brien v. Quality Transport, Inc.*, 309 So.2d 743 (La.Ct.App.1975); *Camus v. Bienvenue*, 91 So.2d 99, 101 (La.Ct.App.1956) (Tate, J.), and defective products, *White v. Martin GMC Trucks, Inc.*, 359 So. 2d 1094, 1101 (La.Ct.App.), *remanded on other grounds*, 362 So.2d 1116, 1117 (La.), *reinstated on remand*, 365 So. 2d 1135, 1136 (La.Ct.App.1978), *writ denied*, 367 So.2d 391 (La.1979). The district court cited no authority for its pronouncement that lost profits are not comprehended in the

that the restrictions Liquid allegedly imposed on its distributors and Red Diamond's alleged termination for violation thereof do not contravene section 51:1405(A).

As with the Louisiana antitrust claim, we find no state case law applying the relevant statute to facts resembling the ones before us. Because of the similarity between section 51:1405 (A) and section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1),[12] however, Louisiana courts look to interpretations of the latter provision for guidance in construing the former.[13] *Gour v. Daray Motor Co.*, 373 So.2d 571, 576-

Note 11-Continued
damage remedy afforded by § 51:1409, and we find none. Nor did the court offer policy reasons for its decision, and since loss of profits is the typical injury from some forms of unfair competition, such as disparaging a competitor's product, we suspect that policy considerations might well cut against the rule announced by the court. Also, *see* note 13, *infra.*

12. Section 5(a)(1) provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

13. Since the Federal Trade Commission Act does not afford a private cause of action for damages for violations of § 5, neither the Act nor the federal case law it has spawned nor provide any guidance on whether lost profits are Recoverable under its Louisiana counterpart. *See* note 11, *supra.* Lost profits generally are recoverable as damages under the Sherman Act, however. *E.g., Greene v. General Foods Corp.*, 517 F.2d 635, 663 (5th Cir. 1975), *cert denied*, 424 U.S. 942, 96 S.Ct. 1409, 47 L.Ed.2d 348 (1976).

78 (La.Ct.App.), *writ of review granted*, 376 So.2d 1270(La.), *dism'd as moot*, 377 So.2d 1033 (La.1979); *Moore v. Goodyear Tire & Rubber Co.*, 364 So.2d 630, 633-34 (La.Ct. App. 1978); *Guste v. Demars*, 330 So.2d 123, 125 (La.Ct.App.1976). Also, section 51:1406(A) exempts from the coverage of section 51:1405(A)—and the rest of the statute—"[a]ny conduct which complies with section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C. 45(a)(1)], as from time to time amended, any rule or regulation promulgated thereunder and any finally adjudicated court decision interpreting the provisions of said Act, rules and regulations."

Under section 5(a)(1), vertical territorial and customer restrictions are not illegal absent a showing of injury to competition. *See Sandura Co. v. FTC*, 339 F.2d 847 (6th Cir. 1964); *Snap-On Tools Corp. v. FTC*, 321 F.2d 825 (7th Cir. 1963). Since Red Diamond failed to prove injury to competition, the court's directed verdict, as well as its judgment n.o.v., is AFFIRMED.

ORAL OPINION OF THE DISTRICT COURT

Your Honor, that these plaintiffs really don't have any facts that would substantiate what the jury ultimately decided on.

They tried to show the jury, through Mr. Pertuit, that we were a solvent party, and that's, in essence, the way the case was tried, Your Honor. The case was not tried as an anti-trust case, not as a case trying to show any conspiracy or agreement or anti-competitive effect. Those facts and evidence that would lead to that factually, as far as a horizontal relationship, is absolutely missing from this case.

The Court, if it grants us a judgment NOV -- and I recall the Court's comment, "lean ". The word of this Court was that it leaned heavily toward granting us a judgment NOV. I think that the Court's decision would be sustained on appeal. I don't think the record will reflect any evidence or any inferences from the evidence which could support plaintiff's decision under the Louisiana Anti-Trust Act.

THE COURT:

Well, I agree with Mr. Henican that probably the best discussion by the Fifth Circuit on the standards for ruling on motions for directed verdict and motions for judgments NOV is contained in Boeing versus Shipman, which I've just sent for, which I have here.

There the Court said -- and I'm reading from the volume -- "On motions for directed verdict and for judgment notwithstanding the verdict, the Court should consider all of the evidence, not just that evidence which supports the non-mover's case, but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and of impartial judgment" -- I'm sorry --"evidence of such quality and weight that tial judgment, might reach different conclusions, the motion should be denied and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment NOV should not be decided by which side has the better of the case, and that they should be granted only when there is a complete absence of probative fact to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts -- and not the Court -- to weigh conflicting evidence and inferences and determine the credibility of witnesses."

And that is found at pages 374 and 375 of 411 Federal 2nd.

Now, while the plaintiff may have demonstrated a scintilla of evidence, there is certainly no conflict of substantial evidence to create a jury question.

Let's go back and retrace the evidence.

As we all will recall it, the 1961 agreement between Liquid Carbonic and Red Diamond is really the primary bastion of plaintiff's case. I think everybody agrees that the 1961 agreement contained territorial and customer restrictions. It's in evidence.

I

That agreement was changed in 1964, and the illegal restrictions were omitted.

Now, there simply isn't any evidence that the restrictions were carried forward after the 1961 contract was changed. Everybody who testified on this point with the exception of Mr. Pertuit, the President of Red Diamond, said that they weren't; but Mr. Pertuit himself admitted that he had never been reprimanded for going into Acme's territory, and he could point to -- and he could point to no enforcement either by Acme or Liquid Carbonic of any alleged restriction.

Now, Clay Belle -- is it Clay Belle? -- Mr. Belle, whatever his first name may have been, the President of Acme, denied on cross examination that he had any understanding with Liquid as to territory.

Now, Mr. Henican, in a very artful bit of cross examination, attempted to impeach Mr. Belle's testimony with his deposition in which he had spoken of an understanding. However, the only fair reading of the deposition testimony of Belle is that Belle was describing the area which he found it convenient and profitable to serve. He wasn't describing an area in which he was forced by Liquid to serve.

Plaintiff has also pointed the deposition testimony of Cy Korman. Korman spoke of assigning or testimony on territories, rather, as an agent of Liquid Carbonic in the early sixties. Everybody agrees that the 1961 agreement made those assignments. The real question is whether they continued to the present.

Korman testified, as I recall it, that Acme's territory was a 50-mile radius around New Orleans, and he said that they still had that territory today; but Korman didn't state that this was a territory that was enforced by Liquid. In fact, Korman stated himself that after he went to work for Acme in, I think it was 1966, that he -- that he himself sold outside of that territory.

So, I believe that the only reasonable interpretation of Korman's testimony is that the territory he was speaking of was the area that Acme found it convenient and profitable to service, not any restricted area outside of which it wasn't permitted to go by Liquid.

Now, Acme made its sales primarily on the East bank of the Mississippi River, and plaintiff points to this as evidence of Acme's territory. But Belle explained that the River created a natural barrier and that it was difficult and inconvenient to cross the River. Nonetheless, Acme did make a few sales on the West bank, again cutting across plaintiff's theory of some inviolate territory.

II

Now, price breaks that were given to Acme are not evidence of any conspiracy on Acme's part.

Now, whether this might give rise to some inference of improper activity on the part of Liquid is quite another question. Certainly, Acme can't be faulted for and no inference can be drawn from the fact that Acme negotiated the best prices that it could.

III

The retail CO2 business was no benefit to Acme, as plaintiff has attempted to argue. All of the witnesses that were familiar with the CO2 business testified that it was more trouble or more of a liability than an asset.

Now, let's move over to our friend, Mr. Robert L. Williams, and his testimony. It is true that Mr. Williams admitted to perjury. He admitted to perjury at the time he gave his first deposition. He maintains that his second deposition and that testimony which he gave here in Court are truthful and that they are correct.

IV

Accepting that as true, he certainly plaintiff's most favorable witness, but he testified only as to what might be regarded as wrongful acts on the part of Liquid -- not Acme. The only time he really mentioned anything at all about Acme was to relate that at a meeting between Witte and Belle, Witte informed Belle that he was going to terminate Red Diamond, and that's the conversation that plaintiff has really hung his hat on. Obviously, that decision had already been made. Belle had no part in it. He was only a passive receptacle for the information, and his only reaction was concerned for Pertuit, whom he had considered, up to that time, and apparently, for some period after, until such time as he found himself a defendant in this lawsuit, a friend. So, he called Pertuit on the telephone, and he told him what Witte had told him. Now, perhaps Williams' testimony indicates wrongdoing on the part of Liquid, but what is there in that testimony to implicate Acme?

Now, the Fifth Circuit hasn't been adverse to granting directed verdicts and judgments NOV in anti-trust cases where

it had been merited by the facts of a particular case. There are a lot of recent examples of that. One that I'm going to mention I read just earlier this week, Panatex Pipeline Company versus Phillips Petroleum in 1972, at 457 Federal 2nd, 1279, Scott Medical Paper Supply Company, Inc. versus Bedsole Surgical Supply Company, Inc., 1974, 488 Federal 2nd, 934.

In each of these cases there were shreds of evidence here and there that might have supported the plaintiff's claim. However, there simply wasn't enough evidence to create a substantial dispute. I think that there's much to be learned in Scott, and I commend it to your attention, as well as an article in the Harvard Law Review by Professor Philip Arita mentioned that the Fifth Circuit had just very recently done something quite similar.

On my way back from San Antonio on Saturday -- I said "earlier this week." I suppose that's as close to the end of last week as anyone could go -- I caught up a little bit on slip opinions that had accumulated, and I found Kestenbaum versus Falstaff Brewing Company, which was decided on June the 23rd. It's slip opinion number 674290. There, the Fifth Circuit reversed a jury verdict for the plaintiff on the ground that plaintiff's proof of damage was nothing more than his own speculation; moreover, that plaintiff had failed to establish any

causal connection between the anti-trust violation alleged and his own damage.

Now, aside from the fact that the plaintiff here at no time indicated that he had ever actually been prevented from going outside of a territory, plaintiff failed to demonstrate that he could have successfully obtained other accounts, or that if he obtained them, he could have kept them and operated them profitably.

Now, given the smallness and the size of the plaintiff's operation, there are real questions which are apparent on the face of the record. The only possible damage attributable to the conspiracy, accepting for the purpose of argument that there was a conspiracy, was the termination of plaintiff's business.

Now, the testimony of plaintiff's expert, Mr. Foster, can't be accepted as in any manner reasonable. His testimony, in my opinion, may be characterized as incredible as a matter of law. Foster contradicted the plaintiff's own income tax returns, and he inflated those figures, in most cases, losses into sizable profits. He made no adjustment for the fact that the gases in question accounted for only 25 to 40 percent of Red Diamond's business; and using these inflated figures, he projected handsome profits for coming years; and Mr. Foster's testimony could only be discounted by reasonable men.

In short, plaintiff's case is built upon a mere scintilla of evidence, indicating possible wrongdoing by Liquid Carbonic but not by Acme, and there simply was no conflict and substantial evidence sufficient to create a jury question.

Accordingly, I am compelled to enter a judgment NOV.

I then have to face the defendants' next motion, the motion for a new trial.

Since it's presented alternatively with the motion for a judgment NOV -- and, of course, I have to rule on both branches of that motion; its somewhat inconsistent, but thats what the rules require. It places the Court in the awkward position of assuming that its grant of judgment NOV will be reversed. But, conditioned on a reversal of the judgment notwithstanding the verdict, I believe that a new trial should be granted. Accordingly, I grant the new trial conditioned upon the Circuit Court of Appeals, if appeal is taken, to a reversal of the Court's granting a judgment NOV.

There are two other motions that remain.

One is a motion for reduction of the jury award.